Editor's note: 88 I.D. 1115; appealed -- dismissed without prejudice, Civ.No. 82-1018 (D.Idaho Nov.16, 1982)

HAVLAH GROUP

IBLA 81-11 Decided December 22, 1981

Appeal from decision of Cottonwood Resource Area Headquarters, Bureau of Land Management, Cottonwood, Idaho, disapproving plan of operations for mining claim within proposed wilderness study area.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness -- Mining Claims: Generally

   The Bureau of Land Management is directed by sec. 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(c) (1976), to manage lands under review for wilderness suitability so as to prevent impairment of wilderness characteristics, except that the continuation of existing mining uses in the same manner and degree in which they were being conducted on the date of enactment of FLPMA (Oct. 21, 1976) is allowed. Such grandfathered use is properly regulated to prevent unnecessary or undue degradation of the land and its resources.

2. Federal Land Policy and Management Act of 1976: Wilderness -- Mining Claims: Generally

   The existence of mining operations actually being conducted on the land on Oct. 21, 1976, and not mere statutory right to use is required to authorize subsequent mining activities in the same manner and degree.

3. Federal Land Policy and Management Act of 1976: Wilderness -- Mining Claims: Generally

   A mining claim located prior to the Federal Land Policy and Management Act of 1976 (Oct. 21, 1976) on which a valid discovery has existed from Oct. 21, 1976, to the present constitutes a valid existing right. The owner of such a claim on land under wilderness review will be allowed to continue mining operations to full development even if operations will impair wilderness suitability, subject to regulation to preclude unnecessary or undue degradation of the land and its resources.

APPEARANCES: Claude Marcus, Esq., Boise, Idaho, for Havlah Group; Roger W. Nesbit, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Havlah Group, a limited partnership, brings this appeal from a decision of the Cottonwood Resource Area Headquarters, Bureau of Land Management (BLM), Cottonwood, Idaho, dated August 20, 1980, disapproving the plan of operations of mining claims filed in accordance with

Departmental regulations at 43 CFR Subpart 3802, 1/ issued pursuant to section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1976).

The background of the decision is provided by documents in the record on appeal. The record contains a copy of a letter dated July 28, 1980, from the BLM Area Manager to Gerald Kooyers, general partner of Havlah Group. Enclosed with the letter was a notice of noncompliance, also dated July 28, 1980, advising appellant that mining operations being carried out in connection with the claims were in violation of regulations at 43 CFR Subpart 3802 for failure to obtain prior BLM approval of a plan of operations for mining activities in the proposed Marshall Mountain Wilderness Study Area (WSA). 2/ The notice also warned appellant that conduct of further operations without compliance would be enjoined by court action.

The letter further notified appellant that:

> If you feel you have a "valid existing right", meaning a valid discovery on October 21, 1976, and continuing to the present time on any of your claims, please submit data supporting this contention. For BLM to determine whether you have a "valid existing right" as defined by 43 CFR

1/ Departmental regulations in 43 CFR Subpart 3802, Exploration and Mining, Wilderness Review Program, were published in the Federal Register (45 FR 13968) on Mar. 3, 1980, and were effective Apr. 2, 1980.

2/ Inventory unit Idaho 62-10, Marshall Mountain, consisting of 6,524 acres, has subsequently been designated a wilderness study area. 45 FR 75587 (Nov. 14, 1980).

> 3802, you will be required to show evidence of such discovery as of the 1976 date (43 CFR 3802.0-5(k)). Supporting data might include assay reports, engineers' reports, or other pertinent data substantiating the discovery on each claim.

Subsequently, pursuant to a complaint filed in the United States District Court 3/ an injunction was issued on August 20, 1980, enjoining appellant from certain activities related to the mining claims within the proposed WSA, including road building, logging of trees over 2 inches in diameter, and construction of a tailings pond, unless such activities are conducted in accordance with a plan of operations approved by BLM.

Havlah Group's plan of operations filed with BLM outlined certain planned activities in conjunction with its mining claims. The public lands affected by the plan were described as portions of secs. 8, 9, and 17, T. 24 N., R. 5 E., Boise meridian, Idaho. The proposed activities included a waste rock dump, construction of roads, tailings pond, millsite, hydroelectric plant, campsite, and sawmill.

The BLM decision appealed from found that the claims in issue are located within the proposed Marshall Mountain WSA to be reviewed for suitability or nonsuitability for preservation as wilderness. No grandfathered existing uses under section 603 of FLPMA, 43 U.S.C.

3/ United States v. Havlah Group, Civ. No. 80-2065 (D. Idaho, filed Aug. , 1980).

§ 1782 (1976), or valid existing rights as defined in 43 CFR 3802.0-5(k) were recognized in this case. Accordingly, BLM held that the public lands under review are subject to interim management to prevent impairment of the area's wilderness suitability.

Regarding Havlah's proposed activities, the BLM decision concluded, based on an environmental assessment, that the anticipated impacts are such that the waste rock dump and construction of roads, tailings pond, and millsite would impair the suitability of the proposed WSA for preservation as wilderness. The Area Manager estimated that it would take about 30 years to properly reclaim the area and, therefore, it would be impossible to reclaim the area to the nonimpairment standard by the time the wilderness study is scheduled to be completed and recommendations submitted on the suitability of the area. The decision held that the hydroelectric plant, campsite, and sawmill are proposed activities which would not impair wilderness suitability with proper mitigating measures, but that it is impossible to separate these activities from the total plan to make them allowable.

On appeal Havlah contends that its claims were located prior to October 21, 1976, that they have been kept in good standing since that time, and that appellant presently has a crew of 9 to 10 men working the claims. Further, appellant contends that the decision is arbitrary, inequitable, without support in law or fact, and an abuse of BLM's discretionary authority. It is alleged that appellant has

"grandfather" rights for the mine operation and is not required to submit a plan of operations. Appellant asserts that the decision violates the mining rights of appellant, that the decision misinterprets and violates applicable Federal statutes and regulations concerning restriction on mining within the WSA, that BLM has no authority under applicable law to require a plan of operations, and, that if BLM does have the authority, it does not have the power to reject a plan which is reasonable and does not violate any laws pertaining to mining or wilderness areas.

In response, the Government states that Havlah purchased certain mining claims adjacent to and within the proposed WSA sometime after October 21, 1976. It is asserted that activities on these claims terminated about February 1942 and they had remained dormant through October 21, 1976, until Havlah commenced operations in the fall of 1979. It is alleged that Havlah does not qualify for "grandfather" rights because the use must be actual and existing on October 21, 1976, and that a mere entitlement to mining use of the land is not sufficient. Finally, a hearing is requested by the Solicitor on the issue of whether appellant has a "valid existing right" which would allow it to develop the claims even if it would impair wilderness characteristics.

The Secretary of the Interior is directed by section 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1976), to review those roadless areas of

5,000 acres or more identified during the inventory of the public lands as having wilderness characteristics 4/ and to make a recommendation to the President regarding the suitability or nonsuitability of each such area for preservation as wilderness. Specific guidance with respect to management of those identified lands pending completion of the review and action by Congress in response to the recommendations is provided by section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1976), which states in pertinent part:

> During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976: Provided, That, in managing the public

4/ Sections 103(i) and 603 of FLPMA, 43 U.S.C. §§ 1702(i) and 1782 (1976), incorporate by reference the definition of wilderness characteristics embodied in section 2(c) of the Wilderness Act of 1964, 16 U.S.C. § 1131(c) (1976), set forth as follows:

"A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of underveloped [sic] Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value."

> lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.

This management mandate for wilderness review lands is further tempered by the provision of section 701(h) of FLPMA that all actions of the Secretary under the Act shall be subject to "valid existing rights." 43 U.S.C. § 1701 note (1976).

Regulations implementing this management authority require an approved plan of operations for mining activities on lands under wilderness review prior to conducting operations which might impair wilderness values such as construction of access roads, cutting of trees over 2 inches in diameter, or use of mechanized earthmoving equipment such as bulldozers. 43 CFR 3802.1-1. An approved plan of operations is not required for operations continued in the same manner and degree as operations existing on October 21, 1976, unless they are causing undue or unnecessary degradation of the land and its resources. 43 CFR 3802.1-3.

Three critical issues are raised by this appeal. The first is whether rejection of appellant's plan of operations on the ground of impairment of wilderness characteristics is contrary to the express exception in section 603(c) of FLPMA allowing "continuation of existing mining * * * uses * * * in the manner and degree in which the same was

being conducted on the date of approval of this Act * * *." (43 U.S.C. § 1782(c) (1976)). A second issue is whether the BLM decision rejecting the plan of operations on the ground of impairment is reasonable and supported by the record. Finally, this case presents the issue of whether rejection of appellant's plan of operations for mining claims located prior to enactment of FLPMA on the ground of impairment of wilderness characteristics is contrary to section 701(h) of FLPMA, 43 U.S.C. § 1701 note (1976), which requires that all actions of the Secretary of the Interior under the statute shall be subject to "valid existing rights."

[1, 2] Section 603(c) of FLPMA provides a bifurcated standard for management of tracts of land of 5,000 acres or more identified as having wilderness characteristics. BLM is authorized to manage the lands so as to prevent impairment of wilderness characteristics unless the lands are subject to an existing mining, grazing, or mineral leasing use. Section 603(c) authorizes continuation of such existing uses in the same "manner and degree" as they were being conducted on October 21, 1976. In the case of such an existing use conducted in the same manner and degree, BLM is authorized to regulate only so as to prevent unnecessary or undue degradation of the environment. State of Utah v. Andrus, 486 F. Supp. 995, 1005 (D. Utah 1979); 43 CFR 3802.1-3. The existence of some operation which is actually being conducted on the land on October 21, 1976, is a prerequisite to authorization of subsequent activities in the same manner and degree. The

statute is referring to actual existing uses, as distinguished from statutory rights to use the land, when it authorizes continuation of existing uses in the same manner and degree. State of Utah v. Andrus, supra at 1006.

The record supports the finding of BLM that the development of appellant's claims detailed in the plan of operations exceeded the manner and degree of any mining use of the claims existing on October 21, 1976, and, accordingly, did not constitute a grandfathered use. Although assessment work as required by law was apparently carried on prior to October 21, 1976, there is no indication of development work in the nature of the work detailed in the rejected plan of operations.

Further, the record supports the BLM determination that the operations proposed in the rejected plan would impair the suitability of the subject area for wilderness designation contrary to the interim management guidelines provided in section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1976).

"Impairment of suitability for inclusion in the Wilderness System" is defined in 43 CFR 3802.0-5(d) as follows:

> (d) "Impairment of suitability for inclusion in the Wilderness System" means taking actions that cause impacts, that cannot be reclaimed to the point of being substantially unnoticeable in the area as a whole by the time the Secretary is scheduled to make a recommendation to the President

> on the suitability of a wilderness study area for inclusion in the National Wilderness Preservation System or have degraded wilderness values so far, compared with the area's values for other purposes, as to significantly constrain the Secretary's recommendation with respect to the area's suitability for preservation as wilderness.

The environmental assessment prepared by BLM in order to evaluate Havlah's plan of operations sets forth the impact of implementation of such operations in detail. For example, with respect to the ore processing mill it was found that:

> An area of about one acre in size would be cleared for the mill, terraced down the mountain. Most of the area cleared would be grand fir, 6-20" in diameter. Access would require the construction of about 400' of new road. The road width is assumed to be 12-14 feet wide, which would accommodate the trucks Havlah plans to use. The area disturbed from road construction could easily exceed 30 feet wide due to steep topography and the extensive cut and fill required.

(Environmental Assessment at 2). Regarding the mine tailings pond, the assessment found that approximately 1-1/2 acres would have to be cleared for the pond and a 30-foot high dike constructed requiring substantial earthmoving. The assessment found that the waste rock dump would entail dumping approximately 22,000 cubic yards of rock in an area of steep topography resulting in a "long downcast area of several hundred feet" (Environmental Assessment at 5). Accordingly, the record supports the decision of BLM that the activities proposed in the plan of operations would impair the suitability of the area for wilderness designation.

[3] The final issue is whether rejection of appellant's plan of operations for mining claims located prior to FLPMA (October 21, 1976) is consistent with the provision of section 701(h) of FLPMA, 43 U.S.C. § 1701 note (1976), to the effect that all actions of the Secretary of the Interior under the Act shall be subject to "valid existing rights." The term "valid existing right" is defined in the regulations as requiring a valid discovery on a mining claim as of October 21, 1976, which discovery continues to be valid at the time of exercise of the right. 43 CFR 3802.0-5(k). The interim management policy developed by BLM for management of lands under wilderness review provides that mining claimants who located claims on or before October 21, 1976, and are able to demonstrate a discovery as of that date under the Mining Law of 1872, as amended, 30 U.S.C. §§ 22-24, 26-28, 29, 30, 33-35, 37, 39-42 (1976), "will be allowed to continue their mining operations to full development even if the operations are causing or will cause impairment." U.S. Department of the Interior, Bureau of Land Management, Interim Management Policy and Guidelines For Land Under Wilderness Review, 44 FR 72013, 72031 (Dec. 12, 1979) (hereinafter cited as Interim Management Policy); Solicitor's Opinion, M-36910 (Supp.), 88 I.D. 909 (1981). 5/

5/ Mining activities in connection with pre-FLPMA claims where "valid existing rights" are established are subject to regulation by the Secretary of the Interior to prevent unnecessary or undue degradation of the lands and their resources. 43 U.S.C. § 1782(c) (1976); Solicitor's Opinion, M-36910 (Supp.), 88 I.D. 909 (1981). Since this regulation extends only to activities which are not necessary or which are excessive or unwarranted in mining development, no constitutional issue of a taking is presented. Solicitor's Opinion, supra. Further, the right to develop locatable mineral resources on the public lands under the Mining Law of 1872 was expressly made subject to "regulations prescribed by law." 30 U.S.C. § 22 (1976).

The interim management policy further provides that the operator will be required to show evidence of such a discovery prior to any BLM grant of approval and that BLM may verify the data through field examination and, if necessary, initiate contest proceedings. Interim Management Policy, supra at 72031. The interim management policy further notes that reasonable access will also be granted to valid pre-FLPMA claims and that such access will be regulated to prevent or minimize impairment of the area's wilderness suitability to the extent possible consistent with enjoyment of claimant's rights. Interim Management Policy, supra at 72031. Accordingly, the regulations and the interim management policy expressly recognize and protect valid existing rights of mining claimants within wilderness study areas.

It is not unreasonable to require a claimant to make a preliminary showing of facts which support a valid existing right. Upon such a showing, BLM may elect either to contest the validity of the claim with notice to claimant and opportunity for a hearing or to permit operations in connection with the claim even though they may impair wilderness characteristics. Although appellant was invited by letter of BLM to make such a showing, the record does not reveal that any supporting evidence has been tendered to BLM at this time. In the absence of tender to BLM of a preliminary showing of factual data supporting the existence of a discovery, the decision is properly affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Douglas E. Henriques
Administrative Judge